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March 27, 2017

OVERNIGHT BY FEDERAL EXPRESS
Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: Petition for Rulemaking and Declaratory Ruling of Craig Moskowitz and Craig Cunningham, CG Docket Nos. 02-278, 05-338

Dear Ms. Dortch:

I am one of the attorneys for Craig Moskowitz and Craig Cunningham in the above-entitled matter. Enclosed for filing please find an original and four copies of the Reply Comments of Craig Moskowitz and Craig Cunningham in Further Support of Their Petition for Rulemaking and Declaratory Ruling.

Respectfully submitted,

Aytan Y. Bellin

Aytan Y. Bellin

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
	)	CG Docket No. 05-338
Petition for Rulemaking and Declaratory Ruling of Craig Moskowitz and Craig Cunningham	)	DA 17-144

REPLY COMMENTS OF CRAIG MOSKOWITZ AND CRAIG CUNNINGHAM IN FURTHER SUPPORT OF THEIR PETITION FOR RULEMAKING AND DECLARATORY RULING

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Counsel for petitioners Craig Cunningham and Craig Moskowitz

Dated: March 27, 2017

TABLE OF CONTENTS

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In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
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SUMMARY OF REPLY COMMENTS

Petitioners Craig Moskowitz and Craig Cunningham respectfully submit these comments in reply to the opposition comments filed since the date Petitioners filed their initial January 22, 2017 Petition for Rulemaking and Declaratory ruling (the "Petition"). As demonstrated below, the scattershot arguments raised in opposition to the Petition cannot refute Petitioners' central point: that the Commission's position that inferring consent to be robocalled from a person's simply providing a telephone number to the calling party is, in the words of a number of courts, "inconsistent with," and indeed "does violence to," the TCPA's clear requirement that a party must give "prior express consent" to be called by autodialer and/or with artificial/pre-recorded voice messages.

ARGUMENT

A. THE COMMENTERS CANNOT JUSTIFY THE COMMISSION'S POSITION THAT "PRIOR EXPRESS CONSENT" TO RECEIVE ROBOCALLS UNDER THE TCPA INCLUDES CONSENT PURPORTEDLY IMPLIED FROM PROVIDING A TELEPHONE NUMBER TO THE CALLING PARTY

As addressed at length in the Petition, the Commission's interpretation that the TCPA's term "prior express consent" includes the purported consent that results simply from a person's providing his or her telephone number contradicts the explicit terms of the TCPA. *See* Petition at 17-28. The commenters' efforts to harmonize that interpretation with the TCPA constitute illogical sophistry.

A number of commenters effectively argue that because the TCPA does not require that "prior express consent" be given in writing, or be given with specific words, the Commission is free to conclude that a party's providing a telephone number constitutes "prior express consent" within the meaning of the TCPA. One commenter appears to have gone so far as to argue that just because a person's providing a telephone number is an "affirmative" act, that person has provided "express consent" to be called by autodialer and pre-recorded message/artificial voice. That commenter further urges that "implied consent" to be called can arise only from the failure of a called party to object to the call.[1]

These arguments do not logically follow, and ignore the difference between what the Supreme Court has described as "consent *simpliciter*" – that is, ordinary consent – and "express consent." *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1947 (2015). For example, in *Roell v. Withrow*, 538 U.S. 580, 582, 587 (2003), the question before the Court was

[1] Comments of Alpha Media, LLC. Emmis Communications Corporation, Entercom Communications Corp., IHeartmedia, Inc., Minnesota Public Radio, and Radio One, Inc., filed March 10, 2017, at 2-3.

whether the "consent of the parties," required under 28 U.S.C. § 636(1) for a Magistrate-Judge to be able conduct all proceedings in a civil case, "c[ould] be inferred from a party's conduct during the litigation," or had to be "express." In ruling on that question, the Court concluded that the defendants had "clearly implied their consent" through their *affirmative actions* of appearing before the Magistrate Judge and participating in the proceedings "all the way to a jury verdict and a judgment for the p[laintiffs]," after having been told by the Magistrate Judge of their "right to refuse and. . . that [the Magistrate Judge] intended to exercise case-dispositive authority." *Id.* at 583, 587, 589. By the same token, the *Roell* Court also concluded that the defendants' actions did *not* evidence "express consent." 538 U.S. at 589-91 & nn.7, 8 (contrasting the implied consent of the defendants through their actions with "express consent."); *Wellness*, 135 S. Ct. at 1948 n.13 (contrasting express consent with implied consent).[2] In either event – in addressing whether a party has given either express or implied consent – the court must find that consent was knowing and voluntary, i.e., the person from whom the consent is being sought must be "made aware of the need for consent and the right to refuse it." *Wellness*, 135 S. Ct. at 1948, *citing Roell*, 538 U.S. at 588 n.5, 590.

Accordingly, simply providing a telephone number can, at most, be considered "implied consent" to being called in the standard fashion by a live person (even though it cannot so be considered, as discussed below). That is because the called party has not expressly consented to being called; instead, the caller must deduce that the called party has given consent from the called party's act of providing his or her telephone number. Moreover, simply providing a

[2] The *Wellness* Court concluded that 28 U.S.C. § 157(c)(2), which requires that a bankruptcy court must obtain the "consent of all the parties to the proceeding" before it can hear certain proceedings, could be satisfied by implied consent; and that "express consent was not necessary" since the terms of the statute only mandated "consent" not "express consent." 135 S. Ct. at 1947-48.

telephone number is not only insufficient to demonstrate "express consent" to be called in general, but it is all the more insufficient to demonstrate "express consent" to be called *with an autodialer and/or a prerecorded message/artificial voice*. In addition, because the Commission's rulings do not require that the person providing the telephone number be first "made aware of the need for consent and the right to refuse it," providing a telephone number, without more, cannot be considered express or implied consent to be called at all, let alone express or implied consent to being called with an autodialer and/or a prerecorded message/artificial voice.

B. THE COMMENTERS HAVE NO RESPONSE TO THE SUBSTANTIAL BODY OF CASELAW HARSHLY CRITICIZING THE COMMISSION'S INTERPRETATION OF "PRIOR EXPRESS CONSENT"

Many of the Commenters have chosen not to address, and try to sweep under the rug, the extensive judicial precedent criticizing the Commission's interpretation of prior express consent, detailed on pages 18-21, 22-24 and 26 of the Petition. Among the cases that Petitioners have cited that specifically address the subject:

> *Mais v. Gulf Coast Collection Bureau, Inc.*, 944 F. Supp.2d 1226, 1239 (S.D. Fla. 2013) ("[t]he FCC is not talking about 'express consent, but instead is engrafting into the statute an additional exception for 'implied consent'—one that Congress did not include. . . . The FCC's construction is inconsistent with the statute's plain language because it impermissibly amends the TCPA to provide an exception for 'prior express ***or implied*** consent.' Congress could have written the statute that way, but it didn't.").[3]
>
> *Edeh v. Midland Credit Management, Inc.*, 748 F. Supp.2d 1030, 1038 (D. Minn. 2010) (debt collector violated TCPA by making autodialed calls to debtor's cell phone without obtaining debtor's consent to receive autodialed calls because

[3] As noted in the Petition, the Eleventh Circuit reversed *Mais* on Hobbs Act jurisdictional grounds, 768 F.3d 1110, 1113, 1119 (11th Cir. 2014), but did not cast any aspersions on the substantive merits of the district court's ruling quoted above.

"'express' means 'explicit,' not, as Midland seems to think, 'implicit.' Edeh did not consent to receive automated calls on his cellular phone.").

Adamcik v. Credit Control Services, Inc., 832 F. Supp.2d 744, 748 n.13 (W.D. Tex. 2011) (court observes that Commission's "interpretation [that providing a telephone number on a student loan application constituted prior express consent] does violence to the clear language of]the TCPA]—the FCC has, in effect, engrafted an implied consent exception onto the statute's requirement of *express* prior consent.").

Hill v. Homeward Residential, Inc., 799 F.3d 544, 551-52 (6th Cir. 2014) ("I express serious doubt as to whether the FCC correctly interpreted the statute when it promulgated the regulations. The notion that a debtor gives his prior express consent to receiving calls from a creditor using an autodialer or prerecorded voice simply by giving his cellphone number to the creditor strikes me as contrary to both the plain language of the statute and the underlying legislative intent.") (Clay, J., concurring).

Leckler v. Cashcall, Inc., 554 F. Supp.2d 1025, 1029-30 (N.D. Cal. 2008) (court rules that providing telephone number on credit application and correspondence does not constitute "prior express consent," reasoning that "the Court finds this construction of 'prior express consent' both 'manifestly contrary to the statute' and unreasonable . . . because it impermissibly amends the TCPA to provide an exception for 'prior express *or implied* consent' and flies in the face of Congress's intent.").[4]

Petitioners urge the Commission to give careful consideration to this well reasoned caselaw demonstrating that express consent means just that, not the tortured notion of implied consent that the commenters are advocating.

Similarly, many of the commenters choose to ignore the caselaw, cited on pages 23-24 of the Petition, ruling that not only must consent be expressly given under the TCPA, but that express consent must be expressly given *specifically to receive autodialed and/or prerecorded/artificial voice calls.* For example:

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[4] Similar to *Mais*, *Leckler* was vacated by mutual consent on Hobbs Act jurisdictional grounds, but the court did not alter its substantive analysis of the prior express consent requirement. *Leckler v. Cashcall, Inc.*, No. C 07-040002, 2008 WL 5000528, **1-2 (N.D. Cal. Nov. 21, 2008).

> *Leckler*, 554 F. Supp.2d at 1030 ("Defendant contends that Congress intended the 'prior express consent' requirement to apply merely to the act of calling . . . and did not intend the express consent to apply to the act of calling using an autodialer or prerecorded message. The Court disagrees. If the exemption were to apply whenever a called party gave prior consent to be called in general, without consideration given to the method or type of call, the exemption would be contrary to the logic of the statute, which targets only those calls made using an autodialer or an artificial voice or prerecorded voice.").
>
> *Edeh*, 748 F. Supp.2d at 1038 ("Midland was not permitted to make an automated call to Edeh's cellular phone unless Edeh had previously said to Midland . . . something like this: 'I give you permission to use an automatic telephone dialing system to call my cellular phone.'").
>
> *Thrasher-Lyon v. CCS Commercial, LLC*, No. 11 C. 04473, 2012 WL 3835089, *5 (N.D. Ill. Sep. 4, 2012) ("'Express' connotes a requirement of specificity, not 'general unrestricted permission' inferred from the act of giving out a number, as CCS urges. Agreeing to be contacted by telephone, which Thrasher-Lyon effectively did when she gave out her number, is much different than expressly consenting to be robo-called. . . .").

Petitioners urge the Commission to give careful consideration to these well reasoned judicial decisions as well.

C. BECAUSE THE TCPA, BY ITS EXPRESS TERMS, REGULATES TELEMARKETING AS WELL AS NON-TELEMARKETING CALLS TO CELL PHONE AND RESIDENTIAL PHONE LINES, THE COMMENTERS' CONTENTION THAT THE TCPA WAS INTENDED TO REGULATE ONLY TELEMARKETING CALLS IS SPECIOUS

Taking another tack, some commenters argue that the Commission should deny this Petition because the "original purpose" of the TCPA was to regulate only telemarketing autodialed and prerecorded/artificial voice telemarketing calls, and not other types of autodialed and prerecorded/artificial voice calls. That argument ignores the structure of the TCPA.

Specifically, neither 47 U.S.C. § 227(b)(1)(A)(iii) (the "Cell Phone Ban") nor 47 U.S.C. § 227(b)(1)(B) (the "Residential Phone Ban") limits its restrictions to telemarketing calls. Moreover, while the TCPA gives the Commission the option to exempt from the TCPA's restrictions non-commercial calls made to residential telephone lines, 47 U.S.C. § 227(b)(1)(B),

(b)(2)(B)(i), the TCPA gives no such option to the Commission with regard to non-commercial autodialed and/or prerecorded/artificial voice calls made to cellular telephones, 47 U.S.C. § 227(b)(1)(A)(iii). Thus, the TCPA's statutory language makes clear that Congress intended the TCPA to apply to telemarketing and non-telemarketing calls alike, and that Congress went so far as to forbid the Commission from permitting telemarketing as well as non-telemarketing autodialed and/or prerecorded/artificial voice calls to be made to cellular telephones without prior express consent.

Given that this statutory framework does not limit the TCPA's reach to telemarketing calls only, any attempt to limit the TCPA's telephone restrictions to telemarketing calls would violate well settled rules of statutory construction. *E.g., Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply. . . ."); *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596 (1951) ("[O]ur problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort."). As the Supreme Court has held:

> Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the legislative problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

Board of Governors of the Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361, 373-74 (1986). Accordingly, the commenters' argument that this Petition should be denied

because applying the TCPA to non-telemarketing calls strays from the TCPA's "original purpose" is meritless.[5]

D. THE COMMENTERS' POLICY ARGUMENTS IN SUPPORT OF THE COMMISSION'S INTERPRETATION OF "PRIOR EXPRESS CONSENT" CANNOT TRUMP A FINDING THAT THE INTERPRETATION CONTRAVENES THE PLAIN TERMS OF THE TCPA

Many commenters argue that "policy reasons" support the Commission's interpretation of the term "prior express consent" in the TCPA to include implied consent through the provision of a telephone number. However, even if the Commission were to agree with the policy reasons purportedly justifying the making of autodialed and/or prerecorded/artificial voice calls to persons who have simply provided their telephone numbers, those policy reasons cannot trump the TCPA's explicit requirement of "prior express consent." As the Supreme Court held in rejecting a similar argument by the Social Security Commissioner: "We will not alter the [statutory] text in order to satisfy the policy preferences of the Commissioner. These are battles that should be fought among the political branches and the industry." *Barnhart v. Sigmon Coal*

[5] Even if a statute's purported "purpose" could be used to contradict the statute's plain terms — which it cannot — the legislative history of the TCPA, which is where the supposed " purpose" of the TCPA would be most logically be found, is, at best for the commenters, contradictory. *See* Petition at 10, 27-28 (contrasting Senate Report that makes clear that TCPA was meant to restrict unconsented to, non-telemarketing autodialed and/or prerecorded message/artificial voice calls with House Report relied upon by commenters). Because "contradictory" legislative materials "should not be permitted to control the customary meaning of [a statute's] words," the legislative history on which the commenters rely cannot be used to deduce the "purpose" of the TCPA, and cannot be used to undermine the TCPA's obvious application to non-telemarketing, autodialed and prerecorded/artificial voice calls. *National Labor Relations Board v. Plasterers' Local Union No. 79*, 404 U.S. 116, 129 n.24 (1971) (internal quotation marks omitted); *United States v. Dickerson*, 310 U.S. 554, 562 (1940) (same); *Calloway v. District of Columbia*, 216 F.3d 1, 12 (D.C. Cir. 2000) (same).

Co., Inc., 534 U.S. 438, 462 (2002); *Landstar Express America, Inc. v. Federal Maritime Commission*, 569 F.3d 493, 498 (D.C. Cir. 2009) (same).[6]

E. THE COMMENTERS' POLICY ARGUMENT THAT CONSUMERS GENERALLY DESIRE AUTODIALED AND PRERECORDED/ARTIFICIAL VOICE CALLS GROSSLY MISCHARACTERIZES REALITY

Even more egregiously, the picture of reality that numerous commenters try to paint – that consumers generally desire, and indeed depend on, robocalls and robo-texts defies reality. By way of example, one commenter goes as far as to "hypothesize" that "Martha . . . an 80-year-old grandmother who suffers from a life-threatening illness" wants robocalls reminding her to refill her prescription; and that other persons who go only by quaint first names love to receive robocalls in a variety of contexts because those robocalls help them "better manage their lives."[7]

This hypothetical utopia grossly misrepresents the real world. As this Commission is well aware, and reiterated in a notice of proposed rulemaking released just several days ago:

> . . . illegal robocalls [] represent an annoyance—and often worse—for consumers. . . . illegal robocalls [] can bombard their phones at all hours of the day, in some cases luring consumers into scams (*e.g.*, when a caller claims to be collecting money owed to the Internal Revenue Service (IRS) or leading to identity theft. . . . . . These examples illustrate why stopping illegal robocalls and the problems they cause has been a focus across industry, government, and consumer groups. Few other communications issues have unified disparate interests the way illegal robocalls have.

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[6] As the Petition makes clear, while the TCPA requires that the consent to be called with an autodialer or with a prerecorded message/artificial voice must be "express," it does not require that such express consent be in writing. Nevertheless, Petitioners are requesting that the Commission exercise its discretion to require such consent be in writing. At a bare minimum, the Commission *must* overturn its ruling that providing a telephone number evidences the "express consent" required by the TCPA because that ruling is inconsistent with the TCPA's statutory mandate.

[7] Comments of Professional Association for Customer Engagement, filed March 9, 2017, at 4, 5, 2.

Notice of Proposed Rulemaking and Notice of Inquiry, CG docket no. 17-59, FCC 17-24, ¶¶ 1, 3 (rel. Mar. 23, 2017). Indeed, as Chairman Pai added in a separate statement to that Notice of Proposed Rulemaking:

> There are millions of Americans [] fed up by illegal robocalls . . . . I count myself as one of them.
>
> Robocalls are the number one consumer complaint to the FCC from the public. And it's no wonder: Every month, U.S. consumers are bombarded by an estimated 2.4 billion robocalls. Not only are unwanted robocalls intrusive and irritating, but they are also frequently employed to scam our most vulnerable populations, like elderly Americans, out of their hard-earned dollars.

Id. at 26.

Similarly, the Federal Trade Commission "received over 900,000 consumer complaints in 2015 relating to debt collection, more than any other industry or practice. Of these complaints[,] over 320,000 reported that the consumer was called repeatedly or continuously, [and] over 306,000 complained about getting calls after sending a 'cease communication' requests to the collector." Comments of the Staff of the Federal Trade Commission's Bureau of Consumer Protection. CG Docket No. 02-278; FCC 16-57, at 2-3, located at https://ecfsapi.fcc.gov/file/60002096439.pdf. As the FTC recognized, robocalling is a significant source of these complaints and raises serious concerns about harassment, invasion of privacy and unlawful disclosure of private information to third parties.[8] Because "consumers often do not

[8] *Id.* at 3-5 ("Robocalling increases the number of possible collection contacts, and any expansion in their use likely will magnify consumer harms arising from debt collection calls."); *id.* at 5 ("robocall and debt collection complaints are among the largest categories of consumer complaints the FTC receives. These calls strike many consumers as abusive and harassing, particularly when they are frequent, and their use in debt collection threatens consumer privacy and poses significant compliance challenges under the FDCPA."); *id.* at 3 ("Congress has long recognized that consumers should be free from abusive telephone calls that impinge on consumers' right to privacy, and consumer complaints demonstrate there is strong demand for measures that help curb the number of unwanted calls.").

appear to recognize that the FDCPA gives them the right to demand that collectors cease contacting them," the FTC also recognized that the only way a right to refuse to consent to robocalling can be made effective is "if it [that right] is well known." *Id.* at 10. The FTC therefore has explicitly "recommend[ed] that the FCC adopt regulations [pursuant to the TCPA] that clearly inform consumers of their right to stop covered robocalls at any time." *Id.*

In short, unwanted robocalls constitute a scourge well known to both the Commission and the FTC, contrary to the false impression that some commenters try to giver.

F. SOUND POLICY REASONS CONSISTENT WITH THE TCPA'S LANGUAGE SUPPORT THE PETITION

Not only are the commenters' policy arguments unavailing, but sound countervailing policy reasons, consistent with the TCPA, support requiring that callers obtain prior express consent from to-be-called parties before a caller can making autodialed and/or prerecorded/artificial voice calls to them. The first, and most obvious reason, as highlighted in the preceding section, is reality: unscrupulous callers make millions and millions of unwanted robocalls to all of us at our cell phone and home phone lines.

Moreover, contrary to some commenters' farfetched claim that if the Petition is granted, they will be unable to make autodialed and/or prerecorded/artificial voice calls that consumers supposedly want, nothing would prevent those commenters from properly obtaining consumers' prior express consent to being called with an autodialer and/or a prerecorded message/artificial voice. If consumers are as delighted to receive such calls as those commenters claim they are, consumers should routinely grant such express consent in response to e-mails, letters, live telephone calls or other communications from the commenters requesting it. The commenters have not provided a single, persuasive reason why they cannot obtain such prior express consent by those means – other than the fact that it will take some effort on their part.

G. REQUIRING THAT CALLED PARTIES EXPRESSLY CONSENT TO RECEIVE ROBOCALLS DOES NOT VIOLATE ROBOCALLERS' FIRST AMENDMENT RIGHTS

One commenter maintains that the TCPA's requirement that callers obtain called parties' prior *express* consent to receiving autodialed and/or prerecorded/artificial voice calls — rather than permitting callers to infer the called parties' consent through provision of their telephone numbers — violates the First Amendment because it allegedly limits political speech.[9] That argument is meritless.

The TCPA is a content-neutral time, place and manner restriction because it does not target any particular ideas, messages or viewpoints. Instead of targeting any type of speech, it is aimed at preventing robocallers from invading privacy, occupying telephone lines, and causing annoyance to, and converting, the property of others without their consent, while still allowing calls to be made to those who agree to receive them. *E.g., Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 876 (9th Cir. 2014), *aff'd*, 136 S. Ct. 663 (2016); *Moser v. F.C.C.*, 46 F.3d 970, 973-74 (9th Cir.), *cert. denied*, 516 U.S. 1161 (1995). Accordingly, the TCPA's express consent requirement is subject only to intermediate scrutiny. *E.g., Turner Broadcasting v. F.C.C.*, 512 U.S. 622, 644 (1994).[10] As the Ninth Circuit and other courts have ruled, 47 U.S.C. §

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[9] Comments of the Republican National Committee, filed March 10, 2017, at 10-12

[10] Petitioners maintain that the exception to the prior express consent requirement added in 2015 for calls made "solely pursuant to the collection of a debt owed to or guaranteed by the United States," 47 U.S.C. § 227(b)(1)(A)(iii), does not change that subsection's content-neutral status. In any event, even if it did, that portion of § 227(b)(1)(A)(iii) would be severable from the remainder of the TCPA, particularly given how recently the TCPA was amended. *E.g., I.N.S. v. Chadha*, 462 U.S. 919, 931-32 (1983) ("[T]he invalid portions of a statute are to be severed unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." (citation omitted)); *Brickman v. Facebook, Inc.*, No. 16-cv-00751, 2017 WL 386238, *8 (N.D. Cal. Jan 27, 2017) ("[E]ven assuming [the government-debt] exception were to be invalid, it would not deem the entire TCPA to be

227(b)(1)(A)(iii) and 47 U.S.C. § 227(b)(1)(B) easily satisfy intermediate scrutiny. *Campbell-Ewald*, 768 F.3d at 876; *Moser*, 46 F.3d at 975; *see also Wreyford v. Citizens for Transportation Mobility, Inc.*, 957 F. Supp.2d 1378, 1380 (N.D. Ga. 2013) (political calls).[11]

Even if the TCPA's prior express consent requirement were subject to strict scrutiny — which it plainly is not — it still would pass muster. 47 U.S.C. § 227(b)(1)(A)(iii) and 47 U.S.C. § 227(b)(1)(B) serve a compelling interest surviving strict scrutiny because, as Congress has concluded, "automated telephone calls are an invasion to privacy, an impediment to interstate commerce, and a disruption to essential public safety services"; and "enacting the TCPA was the only effective means of protecting telephone consumers from this nuisance and privacy invasion." *Brickman*, 2017 WL 386238 at **6-7; *Holt v. Facebook, Inc.*, No. 16-cv-02266, 2017 WL 1100564, *8 (N.D. Cal. Mar. 9, 2017) (47 U.S.C. § 227(b)(1)(A)(iii) serves a compelling interest). Moreover, 47 U.S.C. § 227(b)(1)(A)(iii) and 47 U.S.C. § 227(b)(1)(B) are narrowly tailored to achieve that interest, as various courts have held. *Brickman*, 2017 WL 386238 at **7-9 (analyzing caselaw and so holding with regard to § 227(b)(1)(A)(iii)); *Holt*, 2017 WL 1100564 at **9-10 (same). Not surprisingly, the commenters have not cited a single decision even remotely suggesting that the TCPA violates the First Amendment.

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unconstitutional because the exception would be severable from the remainder of the statute." (footnote omitted)). Nor does the emergency call exception to the prior express consent requirement create an improper content-based distinction. The TCPA's emergency exception is akin to an exception to a noise ordinance for sirens or official responses to emergencies, which would not render such ordinance constitutionally suspect.

[11] *See also Strickler v. Bijora, Inc.*, No. 11 CV 3468, 2012 WL 5386089, **5-6 (N.D. Ill. Oct. 30, 2012) (commercial text messages); *Abbas v. Selling Source, LLC*, No. 09 CV 3413, 2009 WL 4884471, **7-8 (N.D. Ill. Dec. 14, 2009) (same).

H. THE COMMENTERS' AD HOMINEM ATTACKS ON PETITIONERS ARE IRRELEVANT AND INACCURATE

In addition to making unavailing arguments on the merits, some commenters have resorted to making *ad hominem* attacks against Petitioners. Those attacks are as irrelevant as they are inaccurate.

Some commenters first resurrect the tired argument that the Petitioners are somehow unworthy of bringing this Petition because they have exercised, on numerous occasions, the rights granted to them under the TCPA to bring actions for violation of the statute. As numerous courts have recognized, however, frequent litigants often make good, well-informed plaintiffs, and nothing about the frequency of their litigation activities, by itself, makes them any less worthy to make claims than any other litigants. *E.g.*, *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 954 (7th Cir. 2006) ("Nothing about the frequency of Murray's litigation implies that she is less suited to represent others than is a person who received and sued on but a single offer. Repeat litigants may be better able to monitor the conduct of counsel, who as a practical matter are the class's real champions.").

A number of commenters also argue that because Petitioners have a personal interest in the outcome of this Petition — Mr. Cunningham, because is the plaintiff in a pending litigation in which the defendant has raised the Commission's "implied consent" interpretation; and Mr. Moskowitz, because the Commission's "implied consent" interpretation has deterred him from filing a TCPA litigation against another defendant — the Commission should deny the Petition. Petitioners' having a personal interest in the outcome of this Petition – just like the commenters' purportedly having a personal interest in the outcome of this Petition – does not make them inappropriate participants, in which they are proceeding to vindicate real interests. To the contrary, the Commission's petitioner process depends on the fact that interested persons — like

Petitioners and the commenters — will file petitions and comments. Indeed, if Petitioners were raising the issues in this petition in a federal court, they would be *required* to have an interest in the outcome in order to show Article III standing to sue. *E.g., American Library Association v. F.C.C.*, 406 F.3d 689, 696-97 (D.C. Cir. 2005).[12]

Finally, one commenter argues that petitioner Craig Cunningham is unworthy of being a petitioner because a magistrate-judge in one of Mr. Cunningham's cases had recommended that Mr. Cunningham pay attorney fees to the defendant under 15 U.S.C. § 1692k(a)(3) for allegedly filing his suit in bad faith and for the purposes of harassment. *Cunningham v. Credit Management, L.P.*, No. 3:09-cv-1497-G, 2010 WL 3791104, **5-6 (N.D. Tex. Aug. 30, 2010).[13] However, those commenters fail to acknowledge that the district court judge who reviewed that recommendation *rejected* it, holding:

> The Court finds no basis for awarding attorney's fees to the defendants. . . . the defendants have not shown that the plaintiff's actions were motivated by a dishonest purpose or moral obliquity. The defendants are debt collectors, and the plaintiff reasonably—if incorrectly—believed that they did not strictly abide by the law in their attempts to collect a debt that he may have owed. The court finds that the plaintiff's case was not so lacking in arguable merit as to be groundless. Accordingly, the plaintiff's motion for summary judgment on the issue of bad faith should be granted.

Cunningham v. Credit Management, L.P., 3:09-cv-1497-G, 2010 WL 3791049, *2 (Sep. 27, 2010) (internal quotation marks and citations omitted). Accordingly, the commenters' *ad hominem* attacks are baseless.

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[12] Petitioners also categorically deny various commenters' unsupported assertions that the Petitioners somehow invite, entice or desire autodialed and prerecorded/artificial voice calls.

[13] Comments of Alpha Media, et al., Filed March 10, 2017, at 15 & n.53.

I. BECAUSE THE COMMISSION'S IMPROPER INTERPRETATION OF THE TCPA'S PRIOR EXPRESS CONSENT REQUIREMENT HAS BEEN ULTRA VIRES, THE COMMISSION'S INTERPRETATION HAS BEEN VOID AB INITIO

At least one commenter has requested that if the Commission agrees with Petitioners' central position that the Commission's interpretation of prior express consent is inconsistent with the TCPA, the Commission should apply such a ruling only prospectively. The commenter's request is contrary to well-settled law, and the Commission cannot grant it.

While agency rulemaking does not generally apply retroactively (unless Congress has authorized retroactive rulemaking), that general principle has no application here because an invalid, *ultra vires* administrative order or regulation is a nullity to begin with, and therefore has never properly been in force. *E.g., Bartlett Memorial Med. Center, Inc. v. Thompson*, 347 F.3d 828, 846 (10th Cir. 2003) ("Altering an interpretive rule . . . requires notice and opportunity for comment unless, of course, the original interpretation was invalid and therefore a nullity") (Briscoe, J., concurring in part and dissenting in part); *Commissioner of Internal Revenue v. Shamberg's Estate*, 144 F.2d 998, 1014 (2d Cir. 1944) ("It is important to note that, if that regulation was broader than the statute which it purported to interpret, then to that extent it was invalid, was a mere nullity") (internal quotation marks omitted), *cert. denied*, 323 U.S. 792 (1945).

Thus, by definition, a successful challenge to an administrative order or regulation as *ultra vires* would apply to all cases concerning past conduct. *See Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134-35 (1936) (holding that application of amended regulation, which was issued after original regulation was declared invalid as *ultra vires*, to pending cases was not "retroactive" because "[a] regulation which does not [carry into effect the will of Congress] but operates to create a rule out of harmony with the statute, is a

mere nullity . . . Since the original regulation could not be applied, the amended regulation in effect became the primary and controlling rule."), *overruled on other grounds as stated in Levy v. Sterling Holding Co., LLC*, 544 F.3d 493, 506 (3d Cir. 2008); *Dixon v. United States*, 381 U.S. 68, 74-75 (1965) (decision reversing prior incorrect administrative interpretation of statute and applying that interpretation to pending cases "is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand").[14]

Accordingly, if the Commission or a court were to determine that the Commission acted *ultra vires* by interpreting prior express consent in the TCPA to include implied consent resulting from a party's providing a telephone number to the caller, that determination would apply from the outset. The Commission has no power to apply such a ruling only prospectively.

J. THE PETITION FOR RULEMAKING AND DECLARATORY RULING IS TIMELY, AND THE COMMISSION SHOULD NOT DEFER RULING ON IT

Finally, some commenters have tried to erect a number of timing obstacles to the Commission's ruling on the Petition. None has any merit.

Several commenters assert that the Petition is not timely because it was filed more than 30 days after the date of the rulings the Petition seeks to overturn. That argument is unavailing for two reasons. First, it is well settled that a petition for rulemaking is "ordinarily" the "appropriate way in which to challenge a longstanding regulation on the ground that it is violative of [the underlying] statute." *Biggerstaff v. FCC*, 511 F.3d 178, 184 (D.C. Cir. 2007) (citing cases, and so holding in challenge to regulation promulgated pursuant to TCPA) (internal

[14] *See also Peabody Coal Co. v. Director, Office of Workers' Compensation Programs*, 182 F.3d 637, 643 n.12 (8th Cir. 1999) ("We also note that neither the application of our de novo interpretation of the statute nor the application of a new agency rule that corrects an erroneous original interpretation of a statute is retroactive."), *citing Manhattan General Equipment*, 297 U.S. at 135.

quotation marks omitted); *National Labor Relations Board Union v. Federal Labor Relations Authority*, 834 F.2d 191, 195-97 (D.C. Cir. 1987) (after period for review of order promulgating regulation has run, proper way to challenge regulation as *ultra vires* is to "petition the agency for amendment or rescission of the regulation[] and then to appeal the agency's decision"). Accordingly, it was entirely timely and proper for Petitioners to request a rulemaking (a) to overturn the Commission's improper interpretation that "prior express consent" in the TCPA statute includes implied consent resulting from a party's providing a telephone number to the caller; and (b) to uniformly require that "prior express consent" to all calls subject to the TCPA's prohibitions in 47 U.S.C. § 227(b)(1)(A)(iii) and 47 U.S.C. § 227(b)(1)(B) be express consent specifically to receive autodialed and/or artificial voice/prerecorded telephone calls at a specified telephone number. Second, to the extent that Petitioners' request for rulemaking asks the Commission to require that express consent be given *in writing*, Petitioners are aware of no case, and the commenters have cited none, that holds that there is a time limit for such requests for discretionary rulemaking by the Commission, i.e., rulemaking that is not required by the underlying statute, but that will promote the statute's purposes. Accordingly, this portion of the Petitioners' request for rulemaking is timely as well.

Several commenters separately contend that Petitioners' alternative request for a declaratory ruling is untimely. That assertion also is incorrect because, as described on pages 33-37 of the Petition, the purpose of Petitioners' request for declaratory relief is to clear up the confusion caused by the *1992 and 2008 Orders* and their progeny as to the scope of situations in which the Commission's implied consent notions may apply, and in particular, whether those notions may apply outside the debt collection context. There is no time bar for requesting this type declaratory relief either.

Last, a number of commenters have requested the Commission postpone consideration of this Petition until the D.C. Circuit issues a ruling in the pending case of *ACA Int'l v. FCC*, No. 15-1211 (D.C. Cir.), and the Commission completes its ten-year regulatory review process. The pendency of those proceedings, however, provides no basis for the Commission to delay considering the instant Petition. The central (although not sole) issue in this Petition is whether the Commission has exceeded its authority and acted contrary to the requirements of the TCPA by interpreting prior express consent in the TCPA statute to include implied consent resulting from a party's providing a telephone number to a caller. The pending *ACA* case and the Commission's ten-year regulatory review process have absolutely nothing to do with that issue. Indeed, as a matter of law, nothing the D.C. Circuit decides in *ACA* or the Commission decides as part of its ten-year regulatory review can affect the determination of that issue. Accordingly, the commenters' requests that the Commission postpone its decision on this Petition pending the conclusion of those proceedings should be denied.

CONCLUSION

For all the foregoing reasons, as well as those set forth in their opening Petition, Petitioners reiterate their request, pursuant to 47 C.F.R. § 1.401(a), that the Commission initiate a rulemaking (a) to overturn the Commission's improper interpretation that "prior express consent" includes implied consent resulting from a party's providing a telephone number to the caller; and (b) to uniformly require that, for all calls made to cellular and residential lines now subject to the TCPA's prohibitions in 47 U.S.C. § 227(b)(1)(A)(iii) and 47 U.S.C. § 227(b)(1)(B) except calls made by a tax-exempt nonprofit organization or certain types of health care messages addressed in 47 C.F.R. §64.1200(a)(2), "prior express consent" must be (i) express consent (ii) specifically to receive autodialed and/or artificial voice/prerecorded telephone calls,

(iii) at a specified telephone number, and (iv) in writing.

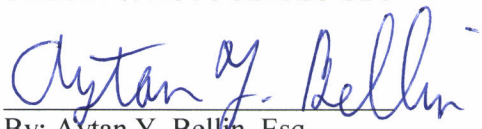
In the alternative, Petitioners request, also pursuant to 47 C.F.R. § 1.401(a), that the Commission initiate a rulemaking for all the purposes described above other than requiring that prior express consent be in writing for non-telemarketing and non-advertising calls subject to the TCPA's prohibitions.

Finally, if the Commission were to deny both of these requests, Petitioners respectfully request that the Commission issue a declaratory ruling to clear up the confusion caused by the *1992 and 2008 Orders*, described at pages 33-37 of the Petition, as to the scope of situations in which the Commission's implied consent notions may apply and, in particular, whether those notions may apply outside the debt collection context.

Dated: March 27, 2017

Respectfully submitted,

BELLIN & ASSOCIATES LLC



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